89-279

No.

Supreme Court, U.S.
FILED
AUG 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PAULINE W. KITTS, as Personal Representative of the Estate of Willard F. Kitts, Deceased,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals below correctly found that Congress had impliedly preempted state common law remedies for product liability in enacting the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. sections 1381 *et seq.*, despite Congress' express statutory command that the Act "does not exempt any person from any liability under common law"?

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R. Pound, *The Spirit of the Common Law* (Beacon ed. 1963) 11
R. Pound, *Readings on the History and System of the Common Law* (2d ed. 1913) 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the district court is unreported and appears in the appendix to this Petition for a Writ of Certiorari at Pet. App. A7 through A9. The opinion of the court of appeals is reported at 875 F.2d 787 (10th Cir. 1989) and appears at Pet. App. A1 through A6.

JURISDICTION

The judgment of the court of appeals was issued on May 19, 1989. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

STATUTES AND REGULATIONS

The National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 80 Stat. 718 *codified* at 15 U.S.C. sections 1381 *et seq.* (1982) ("Safety Act"), provides in pertinent part, as follows:

> § 1392 (d) **Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or State governments**
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.
>
> § 1397 (c) **Continuation of common law liability**
>
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

STATEMENT OF THE CASE

This is a diversity action filed pursuant to 28 U.S.C. section 1332. Plaintiff filed her complaint on July 11, 1985, seeking damages under the common law of New Mexico for the wrongful death of her husband in a single car collision occurring on July 17, 1982. Mr. Kitts was driving a 1982 Pontiac J2000, manufactured by defendant General Motors Corporation ("GM"). Notwithstanding the fact that Mr. Kitts was wearing his three-point seat belt/shoulder harness system that had been installed in the car he was driving, the force of the crash killed him.

In her complaint, Mrs. Kitts alleged that the car was defective and unreasonably dangerous because, among other things, GM failed to utilize available technology to provide a passenger restraint system that would have allowed Kitts to survive the crash ("passive restraint claim"). GM answered the complaint denying the material allegations and asserting as pertinent to this appeal that the National Highway Traffic and Motor Vehicle Safety Act ("Safety Act") preempted Kitts' passive restraint claim.

On August 4, 1986, GM filed a Motion for Partial Summary Judgment, based only on its argument that under New Mexico law the manufacturer owed no duty to Kitts. After the exchange of briefs, the matter rested until July of 1987. Pursuant to what is obviously a coordinated nationwide campaign to raise the argument in virtually every case in which it is a defendant,[1] GM

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1. *See, e.g., Taylor v. General Motors Corporation,* 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corporation,* 865 F.2d 395 (1st Cir. 1988); *Baird v. General Motors Corpora-*

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filed a supplemental memorandum supporting its motion for partial summary judgment with the additional argument that the Safety Act preempted Kitts' common-law passive restraint claim. GM's Motion for Partial Summary Judgment was argued before the district court on September 10, 1987. After nearly three hours of oral argument, the district court took a brief recess and returned to grant GM's motion from the bench. The district court ruled that the common law of New Mexico was preempted by the Safety Act.

Thereafter the district court granted Kitts' request that the district court enter a final judgment pursuant to Fed. R. Civ. P. 54(b) on its decision from the bench. The district court entered its Order granting GM's Motion for Partial Summary Judgment. Kitts prosecuted a timely appeal under 28 U.S.C. section 1291 from that final judgment.

The appeal was fully briefed to the court of appeals by the parties. The court of appeals consolidated the appeal with another similar case from the United States District Court for the District of New Mexico. In addition, an amicus curiae brief was filed by The Products Liability Advisory Council, Inc., The Automobile Importers of America, Inc., and the Motor Vehicle Manufacturers Association of the United States, Inc., arguing that the Safety Act preempted New Mexico's common

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Footnote continued—

tion, 654 F. Supp. 28 (N.D. Ohio 1986); *Bass v. General Motors Corporation*, No. SA-86-CA-279 (W.D. Tex. September 14, 1987); *Donnelly v. General Motors Corporation*, No. 86-576JU (D. Ore. August 3, 1987); *Distler v. General Motors Corporation*, Civ. No. 4-86-821 (D. Minn. September 8, 1987); *Puzio v. General Motors Corporation*, No. L 07-2323-85 (N.J. Super. Ct. March 27, 1987); *Picadio v. General Motors Corporation*, No. GD 85-14613 (Pa. Ct. C.P. December 28, 1987).

law. Amicus Curiae briefs were filed in the consolidated appeal by The Trial Lawyers for Public Justice and The Association of Trial Lawyers of America, arguing that the Safety Act did not preempt state common law. Finally, an amicus curiae brief was filed by the United States Department of Transportation setting forth the position of the federal government on the preemption issue.[2]

On May 19, 1989, the court of appeals issued its opinion and judgment in the appeal. The court affirmed the district court's entry of partial summary judgment in favor of General Motors. The court held that "the Safety Act preempts plaintiff's air bag claim." Pet. App. A5. The court engaged in no independent analysis but rather chose to rely exclusively on the opinion of the United States Court of Appeals for the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988).[3] *See* Pet. App. A6 ("Because we believe *Wood* directly addresses and correctly resolves the issue before us, we follow the general principles articulated in *Wood* and adopt the implied preemption rule of the First Circuit.").

The *Wood* decision was rendered by a split panel of the First Circuit Court of Appeals. The *Wood* majority held that section 1392(d) of the Safety Act did

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2. Initially, the Department of Transportation took no position directly on the preemption issue, but rather called certain relevant concerns to the attention of the court of appeals. Subsequently, the Department of Transportation filed a supplemental brief setting forth its position that the Safety Act would not preempt state common law, except in certain limited situations not applicable to the *Kitts* case.

3. A petition for a Writ of Certiorari to review the court of appeals' decision in *Wood* has been filed in this Court and is presently pending. *See* No. 89-46.

not expressly preempt state common law tort claims. The majority opinion went on to hold, however, that notwithstanding the explicit language of section 1397(c) preserving all common law claims,[4] state common law tort claims based on negligent or defective design were somehow impliedly preempted. The *Wood* majority reached a conclusion of implied preemption of common law remedies solely and exclusively on its own (rather than Congress') judgment that "[a]llowing a common law action holding manufacturers liable would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area." *Wood,* 865 F.2d at 402. In reaching this conclusion, the *Wood* majority disregarded the clear and unqualified language of section 1397(c) to speculate that Congress had in mind the preservation of only certain types of common law claims when it enacted the Safety Act. *See Wood v. General Motors Corp.,* 865 F.2d at 402. The *Wood* dissent disagreed with the approach of the majority in speculating that Congress intended to preserve only certain common law claims and instead would have given effect to the clear and unqualified language in section 1397(c) which preserved claims against "any person [for] any liability under common law." *See Wood,* 865 F.2d at 421-22 (Selya, J. *dissenting*).

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4. Section 1397(c) provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

REASONS FOR GRANTING THE WRIT

Petitioner has been unable to find one case decided by this Court where preemption was found in the face of language as clearly and explicitly reflecting Congress' intent on preserving common law claims as that of section 1397(c) of the Safety Act. Quite simply, it is inconceivable to petitioner that the lower court can find preemption contrary to the express congressional statement that the statute does *not* exempt any person from any liability under common law. The present petition should be granted because the decision of the court of appeals below departs from a century of preemption analysis under the supremacy clause of the Constitution to reach a result which dangerously disrupts the delicate balance of federalism in our Republic that the supremacy clause was designed to preserve and ignores important separation of powers principles.

The approach adopted by the court of appeals below —in disregarding the expressed intention of Congress and instead resting its finding of preemption on the court's own speculative perception of a conflict between the federal statute and the state's common law[5]—ignores the

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5. *Wood*, and the lower court's opinion in the instant case, are based on two fundamental errors. First, both courts assume the false premise that because design defect verdicts may have some regulatory impact, they are therefore "tantamount to establishing . . . conflicting safety standard[s]." Pet. App. at A6. Second, both courts perceive the primacy of a goal of federal uniformity, a conclusion wholly devoid of any content rooted in Congressional action. The facts are, as the petitioners in *Wood* make clear, that Congress was well aware of the potential impact of design defect verdicts under the common law when it passed the Safety Act, with its express non-preemption declaration in section 1397(c), and, that the court's perception of a goal of federal uniformity is nothing less than a judicial

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separation of powers between the legislative and judicial branches of government and shifts the focus of inquiry under preemption analysis from what Congress intended to the court's own perception of proper policy. These important concerns require authoritative resolution by this Court, since the numerous cases addressing the preemptive effect of the Safety Act have provoked conflicting decisions in the lower federal and state courts.

1. The Implied Preemption of State Common Law Sets a Dangerous Precedent, Threatening the Vitality of Our Precious Common Law Heritage, Disrupting the Delicate Balance of Federalism in Our Republic, and Violating Fundamental Principles of Separation of Powers.

GM's arguments below and its coordinated campaign in the courts throughout the country constitute a frontal assault on the common law. What GM seeks is to substitute administrative rulemaking (which not coincidentally GM has considerable ability to influence)[6] for the

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Footnote continued—

weighing of conflicting policies, which is directly contrary to that expressly engaged in by Congress. *See Wood v. General Motors Corp.*, No. 89-46, Pet. at 13-19. GM's argument (accepted by the *Wood* court and the court below in this case) reduces itself to the proposition that anytime Congress authorizes a federal administrative safety standard, the adoption of that standard necessarily forecloses any product liability claim based on design defect when the standard has been met, even where Congress has expressly declared to the contrary.

6. The history of FMVSS 208, upon which GM and the courts below relied in finding preemption, is a perfect example of what is wrong with administrative rulemaking, even for its legitimate and limited purposes, much less as a substitute for common law remedies for injuries. For nearly twenty years after the technology for air bags was available and after it was known that the introduction of such systems would save

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common law system for remedying injuries. Of course, as a result of its campaign, Mr. Kitts' survivors and thousands of other persons maimed or killed because of defectively designed automobiles will be without any remedies whatsoever. Equally important, GM seeks to employ the federal courts to stifle and thwart the evolving common law of product liability in the states, a development that is nearly universally recognized as one of the signal developments in the law in the twentieth century.[7]

Footnote continued—

scores of thousands of lives, GM and other car manufacturers dragged their feet and repeatedly forced the administrative agency, the National Highway and Transportation Safety Administration to back off from its proposed rules requiring introduction of passive restraint systems. GM's obduracy was matched only by the administrative agency's pusillanimity. *See* Insurance Institute for Highway Safety, "Air Bags: A Chronological History of Delay" (1984). Indeed, Mr. Kitts' car was not equipped with air bags because at the time his car was manufactured the administrative agency had illegally rescinded its rule requiring air bags, as determined by this Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983). Ironically the same party in *State Farm* unsuccessfully seeking to defend the arbitrary and capricious rescission of the rulemaking was an amicus curiae in the court below, urging that the Safety Act preempts the states' common law.

7. For more than seventy years—at least since Chief Judge Cardozo's seminal decision in *MacPherson v. Buick Motor Co.*, 217 N.Y.2d 382, 111 N.E. 1050 (1916)—the common law has imposed on manufacturers of negligently designed or manufactured automobiles liability to compensate victims who have been injured as a result of the manufacturer's negligence. With its characteristic flexibility and adaptability, the common law in this area has evolved into one of this century's major legal developments, the law of product liability. Sometimes employing a negligence standard and sometimes employing a standard of strict liability, product liability law requires that a manufacturer be held responsible to compensate those who are injured by the manufacturer's negligence or by a defect in the product which poses an unreasonable danger to the foreseeable user.

The supremacy clause of article VI of the Constitution is central to the structure of our federal system. Because the effect of the supremacy clause is to invade the sovereignty of the individual states, the preemption power is vested exclusively in Congress. What this means is that state law is not preempted just because a federal judge prefers the federal policy to the state policy; or even where a federal judge may determine that the state policy is in conflict with the federal policy. The touchstone is congressional intent to preempt state law. *See, e.g., Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 369 (1986); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141 (1963). The federal court may find state law preempted *only* where the court determines that Congress has intended to preempt state law.

In this respect, the power to preempt state law belongs to Congress exclusively, and the role of the federal court is to determine the congressional intent and to apply it. This is the reason why this Court has stated that in determining whether state laws are preempted by federal statutes, the "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra,* 479 U.S. 272, 280 (1987). Moreover, the "courts should not lightly infer pre-emption," *International Paper Co. v. Ouellette,* 479 U.S. 481, 491 (1987), and there is a heavy presumption against finding preemption where the claim of preemption addresses the historic police powers of the state, such as common law tort liability. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144 (1963); *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529, 1542 (D.C. Cir. 1984). "[W]e start with the assumption that the historic police powers of the States were not to be superceded by the Federal

Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The court of appeals' decision below ignores this Court's injunction and trenches on historic state powers in the absence of a manifest congressional purpose to do so. The effect of the decision below is to quash an important area of common law development in the states. This effect, of course, is not limited to those areas of common law product liability dealing with design defects in automobiles. The reasoning of the court of appeals below would apply also to the many other areas in which Congress has enacted minimum design standards. The potential impact on this important area of common law development, therefore, is great.

From Pollock[8] to Plucknett[9] to Pound,[10] the common law has been recognized as a prized part of our Anglo-American legal heritage and a cornerstone of our legal system. The founding fathers of the Republic expressly and specifically recognized the common law as one of the bulwarks of political liberty.[11] This Court has rec-

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8. *See, e.g.*, F. Pollock, *Oxford Lectures and Other Discourses* 111 (London 1890) *reprinted* edition 4 *Classics in Legal History* (R. Mersky & J. Jacobstein eds. 1970) ("So venerable, so majestic, is this living temple of justice, this immemorial and yet freshly growing fabric of the Common Law, that least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there.").

9. *See* T.F.T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956).

10. *See, e.g.*, R. Pound *The Spirit of the Common Law* 4-5 (Beacon ed. 1963) (extolling the "vitality and tenacity" of the common law).

11. Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means

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ognized that the common law is a matter distinctly reserved to development in the several states. For example, Justice Holmes repeatedly attacked the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) as impermissibly infringing on the states' sovereign power to develop their respective common laws. *See Black and White Taxicab and Transfer Co. v. Black and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533-34 (1928) (Holmes, J., dissenting) ("The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State . . . ."). Justice Holmes' view, of course, was vindicated in *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938). The same evil which Justice Holmes identified and which caused this Court to overturn *Swift* in *Erie* prohibits federal judges, independent of the will of Congress, from preempting state common law.

It is precisely these interests and concerns which animated this Court to impose a particularly heavy presumption against a finding of preemption of state common law remedies. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Nader v. Allegheny Airlines,*

Footnote continued—

> of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties declare . . .
>
> 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers in the vicinage, according to the course of law.

Declaration of Rights of the Continental Congress (1774), *as excerpted in* R. Pound, *Readings on the History and System of the Common Law* viii (2d ed. 1913). Similar sentiments were expressed fifteen years later in the seventh amendment to the Constitution of the United States.

426 U.S. 290, 298 (1976); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 211-13 (1971). The presumption against finding preemption reflects two salient concerns. First, the presumption reflects a deference to the sovereignty of the states, especially in those areas that have been traditionally reserved to state supervision. *See Rice*, 331 U.S. at 230. Second, the presumption reflects a caution on the part of the courts in attributing to Congress an intent to leave injured persons without remedies. As this Court stated in *Silkwood*, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U.S. at 251; *see also United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954).

If it was "difficult" for this Court in *Silkwood* to believe that Congress would silently remove common law remedies for injuries, it is inconceivable in this case to believe that Congress did so in the face of its explicit command in section 1397(c) that the Act "does not exempt any person from any liability under common law." This language, of course, is what compelled the court of appeals below to hold that Congress did not express an intention to preempt. While this conclusion is unassailable, it makes indefensible the remainder of the court's analysis, that somehow the Safety Act impliedly preempts state common law. Once the court of appeals correctly concluded that Congress had expressly considered the matter, it made no sense to even address implied preemption. Congress considered the preemptive effect of the Safety Act in sections 1392(d) and 1397(c) and as the court of appeals found did not thereby intend to preempt common law remedies. In this context, any

finding of implied preemption must rest not on Congress' intent but rather on the court's own perception of policy.[12]

If the court of appeals' decision is left to stand, we will be back to pre-*Erie* days, where federal courts on the basis of their own determinations of proper policy can invade state sovereignty and displace important segments of state common law development. Under the supremacy clause, this is a power conferred only on Congress and Congress' intent to exercise that power is not to be casually or lightly inferred. The court of appeals' decision at once ignores the separation of powers by arrogating to the courts a power reserved exclusively to Congress and disrupts the balance of federalism preserved by the supremacy clause by invading state sovereignty and displacing this important common law area. This Court should grant review to reestablish the proper constitutional roles and balances.

2. The Decision of the Court of Appeals Is Manifestly in Error and Works a Grave Injustice.

While this Court does not exercise its certiorari review power solely to rectify errors and correct injustices, these considerations are not wholly irrelevant. The court of appeals' decision is wrong for so many reasons that

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12. In an analogous context, this Court has refused to find an implied administrative preemption in the face of language in the federal statute which clearly evinced an intent not to give the administrative agency the power to displace state law. *Louisiana Public Service Commission v. FCC*, 476 U.S. at 473-76. In *Louisiana PSC*, the statutory language precluded finding express preemption. The FCC then argued that state regulation would frustrate the federal policies. This Court held that the express statutory language precluded a finding of implied preemption, even if the federal policies would be frustrated. *Id.* at 476. ("While we do not deprecate this concern, § 152(b) precludes both the FCC and this Court from providing the relief sought [preemption of state regulation].").

it seems incredible that the court below, as well as two other circuit courts,[13] reached that result.

First, the decision contradicts Congress' explicit command that the Safety Act "not exempt any person from any liability under common law." 15 U.S.C. section 1397(c).

Second, as described in Point 1, above, the court incorrectly proceeded to find implied preemption after it had determined that Congress explicitly adverted to the preemptive effect of the statute and Congress' expression of the preemptive effect preserved rather than preempted common law remedies. *Cf. Louisiana Public Service Commission v. FCC, supra.*

Third, the court of appeals' decision wholly ignores the heavy presumption, articulated by this Court, against finding preemption of common law remedies. *See Silkwood v. Kerr-McGee Corp., supra; Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

Fourth, the court of appeals erroneously identified "uniformity" as a primary goal of Congress in enacting the Safety Act. Pet. App. A6. Nowhere in Congress' own expression of its purposes is uniformity even mentioned, much less identified as a primary purpose. *See* 15 U.S.C. section 1381.

Fifth, even assuming that "uniformity" were a primary purpose of the Safety Act, common law remedies for damages do not frustrate that legislative goal. Com-

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13. In addition to the instant decision and that of the first circuit in *Wood*, the eleventh circuit reached the same result in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989).

mon sense and human experience both suggest that federal minimum design standards can and do coexist with the continuation of damages actions for injuries sustained. Certainly they have coexisted for the twenty years between the passage of the Safety Act in 1966 and the current decisions that are at issue in this petition.

In addition to being manifestly in error, the court of appeals' decision works a grave injustice. If allowed to stand, the decision below deprives Mrs. Kitts of any remedy for her grievous loss, even though General Motors may have been flagrantly negligent in its design. This injustice, of course, will be visited not only on Mrs. Kitts but also thousands of other victims. This Court has repeatedly expressed a solicitude for protecting common law remedies from disruption through speculative claims of preemption. *See, e.g., Silkwood v. Kerr-McGee Corp., supra.*

3. The Preemptive Effect of the Federal Safety Statute Presents a Question of Wide and Enduring Significance, Provoking Conflicting Decisions in the Lower Federal and State Courts. The Issue Requires Final Resolution by This Court.

There is no doubt that over the past three years or so, there has been a coordinated and concerted program among automobile manufacturers to raise the argument that the enactment of the Safety Act preempts state common law remedies based on defective or negligent design. The issue has been raised and addressed in more than twenty cases and the courts have substantially divided in result.[14] There is equally no doubt that

14. Numerous cases have addressed the preemption issue and resolved it in favor of preserving common law remedies.

(Continued on following page)

this issue will continue to be raised until it is finally resolved by this Court. The decision below presents the issue squarely to this Court. The considerations have been sufficiently explored and refined. This Court, therefore, should grant this petition to address the important issue raised and finally resolve it.

Footnote continued—

See, e.g., Murphy v. Nissan Motor Corp., 650 F. Supp. 922 (E.D.N.Y. 1987); *Garrett v. Ford Motor Co.*, No. JH-86-582 (D. Md. August 21, 1987); *Seemann v. General Motors Corp.*, No. 86-6145 (CL)"AI" (Fla. Cir. Ct. March 7, 1989); *Picadio v. General Motors Corp.*, No. GD 85-14613 (Pa. Ct. C.P. December 28, 1987); *Kimbrel v. Jones*, No. 85-6068B (Tex. Dist. Ct. October 13, 1987); *Steenbergen v. Ford Motor Co.*, No. 85-15718-C (Tex. Dist. Ct. June 30, 1986); *Lynch v. Mims*, No. GCG 85-0019 (Fla. Cir. Ct. August 20, 1985); *Morgan v. Noble*, No. 84-Cl-136 (Ky. Cir. Ct. February 17, 1986); *Munson v. Pearcy*, No. B-840,570 (Tex. Dist. Ct. May 15, 1986); *Barfels v. Holman Imports*, No. 85-1901-CB (Fla. Cir. Ct. September 1985); *Burge v. Blight*, No. 44-74-75 (Cal. Super. Ct., Orange County June 30, 1987).

In addition to the cases noted above in footnote one, there are numerous cases both federal and state which have found common law remedies to be preempted. *See, e.g., Schick v. Chrysler Corp.*, 675 F. Supp. 270 (D.S.D. 1987); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1988); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vasquez v. Ford Motor Co.*, No. CIV 86-0657 PHX WPC (D. Ariz. November 4, 1986); *Phillis v. Naime*, No. 85-33951-CA-07 (Fla. Cir. Ct. September 22, 1986); *Pederson v. Ford Motor Co.*, No. 3AN-85-15565 (Alaska Super. Ct. September 24, 1987); *Gardner v. Honda Motor Co.*, Index No. H-72107 (N.Y. Sup. Ct. August 26, 1987); *Ross v. Ford Motor Co.*, No. CV119361 (Ohio Ct. C.P. May 5, 1987); *Soboscienski v. Ford Motor Co.*, No. 2NO-85-246 (Alaska Super. Ct. October 28, 1986); *Mackey v. American Honda Motor Co.*, No. 83CV-08-4508 (Ohio Ct. C.P. December 29, 1986).

CONCLUSION

For all the above reasons, petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

(Filed May 19, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 87-2517

PAULINE W. KITTS, as Personal Representative of the Estate of Willard F. Kitts, Deceased,
Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

PRODUCT LIABILITY ADVISORY COUNCIL, INC., AUTOMOBILE IMPORTERS OF AMERICA, INC., and MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC.,
Amicus Curiae.

No. 88-1900

WAYNE M. RICHART, as Personal Representative of the Estates of Norman J. Richart, Deceased, and Jean R. Richart, Deceased,
Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,
Defendant-Appellant.

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA; TRIAL LAWYERS FOR PUBLIC JUSTICE; and UNITED STATES OF AMERICA,
Amici Curiae.

Appeal From the United States District Court
for the District of New Mexico
(D.C. CIV 85-0967 JC for Tenth Cir. No. 87-2517)
(D.C. Civil No. 86-0926-JB for Tenth Cir. No. 88-1900)

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(B. Wayne Vance, General Counsel, and Kenneth N. Weinstein, Deputy Assistant General Counsel, U.S. Department of Transportation; Erika Z. Jones, Chief Counsel, and David W. Allen, Assistant Chief Counsel, National Highway Traffic Safety Administration, Washington, D.C.; William L. Lutz, United States Attorney for the District of New Mexico; John R. Bolton, Assistant Attorney General, and Douglas Letter, Appellate Litigation Counsel, Civil Division, Department of Justice, Washington, D.C., on the brief for Amicus Curiae United States in No. 88-1900.)

Before McKAY, McWILLIAMS, and BALDOCK, Circuit Judges.

McKAY, Circuit Judge.

Kitts v. General Motors Corp., No. 87-2517, and *Richart v. Ford Motor Co.*, No. 88-1900, were separately submitted to us. On our own motion we consolidate for purposes of disposition of the preemption issue before us in both cases.

Although the cases before us are not factually identical, appellants raise the same issue on appeal: whether section 1392(d) of the National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 (1982), preempts state tort claims against automobile manufacturers who comply with Federal Motor Vehicle Safety Standards ("FMVSS") regarding occupant crash protection but fail to install air bags as well. *See* 15 U.S.C. § 1392(d) (1982)[1] and FMVSS 208, 49 C.F.R. § 571.208, S4.1.2 (1987).[2] In each case the plaintiff sued an automobile manufacturer under New Mexico tort law alleging that an automobile manufactured by it was negligently and defectively designed because it did not have a passive restraint system, *i.e.*, air bags, in addition to or instead of federally approved safety belts.[3]

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1. Section 1392(d) states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d) (1982).

2. FMVSS 208 details the occupant crash protection options a manufacturer may install in passenger vehicles in order to comply with federal motor vehicle safety standards. At the time these automobiles were manufactured, a manufacturer could comply with FMVSS 208 by installing (1) a complete passive protection system for front and lateral crashes; (2) passive protection for frontal crashes plus lap belts with belt warning for side crashes and rollovers; or (3) manual lap and shoulder belts with belt warning. 49 C.F.R. § 571.208, S4.1.2 (1987).

3. In *Richart*, plaintiff alleged that the car was negligently designed, and not crashworthy, because it lacked air bags. In *Kitts*, plaintiff alleged that the car was defective and unreasonably dangerous because the manufacturer failed to utilize available technology, *i.e.*, air bags, which would have prevented the death of plaintiff's decedent.

Both defendants moved for partial summary judgment on the ground that the Safety Act preempts plaintiffs' air bag claims.[4] *See* 15 U.S.C. § 1392(d) (1987). In response to defendants' motions, each plaintiff argued that its claim was a common law tort claim expressly saved by section 1397(c) of the Safety Act. *See* 15 U.S.C. § 1397(c) (1982).[5] The district courts reached opposite conclusions: The trial court in *Kitts* held that the Safety Act preempts plaintiff's air bag claim; the trial court in *Richart* held that the Safety Act does not preempt plaintiff's air bag claim.

We conclude that the Safety Act preempts plaintiff's air bag claim. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). For our purposes, *Wood* is almost identical to the cases before us: the plaintiff alleged under state law that the automobile manufactured by the defendant was defective because it was equipped with safety belts rather than air bags or another passive restraint system (*e.g.*, automatic safety belts). The defendant moved for summary judgment on the ground that the Safety Act and FMVSS 208 promulgated under the Act preempt plaintiff's claim.

In *Wood*, the First Circuit rejected an express preemption claim, but held that section 1392(d) of the Safety

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4. The *Richart* defendant moved for partial summary judgment on the additional ground that the Safety Act and Federal Motor Vehicle Safety Standard 208 impliedly preempt plaintiff's air bag claim. The *Kitts* defendant moved for partial summary judgment on the additional ground that it owed no duty to the decedent under New Mexico law. Due to our disposition of the preemption issue, we need not reach *Kitts'* second ground. *See* discussion *infra*.

5. Section 1397(c) states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c) (1982).

Act and FMVSS 208 impliedly preempt plaintiff's passive restraint claim. The Court found that

> Congress's purposes, as revealed in the Safety Act and in the legislative history, plainly *imply* a preemptive intent.
>
> Such an action is . . . impliedly preempted because it would effectively circumvent section 1392(d)'s prohibition of nonidentical state standards covering the same aspect of performance as a federal safety standard. Allowing a common law action holding manufacturers liable for failing to install air bags in motor vehicles would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area.

Id. at 402 (emphasis in original). Because we believe *Wood* directly addresses and correctly resolves the issue before us, we follow the general principles articulated in *Wood* and adopt the implied preemption rule of the First Circuit.

In view of our determination that the Safety Act preempts plaintiff's air bag claim, we affirm the trial court's grant of partial summary judgment to the defendant in *Kitts* and reverse the trial court's denial of partial summary judgment to the defendant in *Richart*. We also direct the trial court in *Richart* to enter partial summary judgment for the defendant.

(Filed October 2, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 85-0967 JC

PAULINE W. KITTS, as Personal Representative of the Estate of WILLARD F. KITTS,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
a foreign corporation,
Defendant.

FINAL JUDGMENT

THE COURT, having granted Partial Summary Judgment on Defendant General Motors Corporation's Motion for Partial Summary Judgment, and

The Court having directed that the Clerk enter a final judgment dismissing Plaintiff's "air bag" claim, now therefore,

IT IS ORDERED that Final Judgment be, and hereby is, entered dismissing the Plaintiff's "air bag" claim against the Defendant General Motors Corporation.

DONE at Albuquerque, this 2nd day of October, 1987.

/s/ Jesse Casaus
Clerk, U.S. District Court

(Filed September 29, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 85-0967 JC

PAULINE W. KITTS, as Personal Representative of the Estate of WILLARD F. KITTS,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
a foreign corporation,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT ON PLAINTIFF'S "AIR BAG" CLAIM

Defendant General Motors Corporation's Motion for Partial Summary Judgment on Plaintiff's claim that her 1982 Pontiac J-2000 should have been equipped with air bags came on for hearing before the Court on September 10, 1987. Upon consideration of the pleadings, briefs and the oral arguments of counsel, the Court finds:

1. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1381, *et seq.* ("Safety Act") and regulations promulgated thereunder were intended by Congress to preempt any non-identical state standards, whether established through the application of common law principles of liability or otherwise, as to any federally regulated aspect of vehicle performance.

15 U.S.C. §1392(d). Accordingly, Plaintiff's air bag claim is preempted by 15 U.S.C. §1392(d) and is not saved by 15 U.S.C. §1397(c). *E.g., Donnelly v. General Motors Corp.*, No. 86-576-JU, District Court of Oregon, August 30, 1987 (adopting Magistrates rulings of June 22, 1987; *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095 (E.D. Mo. 1986). Moreover, Plaintiff's air bag claim, if permitted, would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Safety Act and Federal Motor Vehicle Safety Standard 208, and is preempted for this reason as well. *E.g., Baird v. General Motors Corp.*, 654 F.Supp., 28 (N.D. Ohio 1986); *Wattelet v. Toyota Motor Corp.*, (D. Mont. April 27, 1987); *Wickstrom v. Maplewood Toyota, Inc.*, Consumer Prod. Safety Guide (CCH) Para. 75,377 at 61,265 (Minn. Dist. Ct. March 12, 1987).

2. Defendant General Motors Corporation had no duty under New Mexico law to equip the subject vehicle with air bags. Accordingly, Plaintiff's air bag claim does not state a cause of action under New Mexico law.

3. There is no just reason for delay in entering a final judgment dismissing Plaintiff's "air bag" claim.

IT IS THEREFORE ORDERED that Defendant General Motors Corporation's Motion for Partial Summary Judgment be, and it hereby is, granted.

IT IS FURTHER ORDERED that the Clerk of this Court be, and hereby is, directed to enter a final judgment, dismissing Plaintiff's "air bag" claim.

DATED this 28th day of September, 1987.

/s/ John E. Conway
United States District Judge

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-279

(2)

In The

Supreme Court of the United States

October Term, 1989

PAULINE W. KITTS,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Tenth Circuit followed an earlier decision of the First Circuit, and held that federal law impliedly preempts a state common-law claim that a car is defective because it was equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. All federal and state appellate courts to address the question, and a host of trial courts, are in accord with the First and Tenth Circuits. Should this Court review the Tenth Circuit's decision?

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Free v. Bland, 369 U.S. 663 (1962) 10

Gardner v. Honda Motor Co., 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988), *appeal dismissed*, 74 N.Y.2d 715, 543 N.Y.S.2d 401 (1989)...2, 11

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Pokorny v. Ford Motor Co., 714 F. Supp. 739 (E.D. Pa. 1989) 2, 11, 12

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Schick v. Chrysler Corp., 675 F. Supp. 1183 (D.S.D. 1987) 3

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Seemann v. General Motors Corp., No. 86-6145 (CL) "AI" (Fla. Cir. Ct. Aug. 31, 1989) 4, 11

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Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 6

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Wells Fargo Business Credit v. American Bank of Commerce, 780 F.2d 871 (10th Cir. 1985) 12

Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988) 2, 6, 11

Wolfe v. General Motors Corp., No. CV8720704 (Ohio Ct. C.P. Mar. 6, 1988) 4

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988) 2, 5, 6, 7, 10

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National Traffic and Motor Vehicle Safety Act

15 U.S.C. § 1381 *et seq*. 6

15 U.S.C. § 1392(d) 6, 10

15 U.S.C § 1397(c) 5, 7

MISCELLANEOUS

Teret & Downey, *Air Bag Litigation*, 18 Trial (July 1982) at 93 9

The Air Bag Goes To Court, N.Y. Times, Oct. 29, 1984, § D at 1, col. 4 9

No. 89-279

In The

Supreme Court of the United States

October Term, 1989

PAULINE W. KITTS,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Tenth Circuit held that federal law preempts petitioner's common-law claim that a car is defective because it was equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. The decision is in accord with every state and federal appellate court to address the question and dozens of trial courts all across the country.

This is not the first time the Court has been asked to address the issue. Just last term, a petition was filed seeking review of a decision of the Minnesota Court of Appeals, the first appellate court to address the issue, finding airbag claims preempted, and this Court declined

to review it. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988). Since then, a petition for certiorari has been filed in *Wood v. General Motors Corp.*, No. 89-46, seeking review of the First Circuit's finding that airbag claims are preempted. General Motors filed its opposition to that petition on August 25, 1989, and that matter is still pending.

The Tenth Circuit adopted and followed the *Wood* decision. General Motors has already explained why review of *Wood* is unnecessary in its brief opposing the *Wood* petition for certiorari, and those arguments apply equally here. We do not wish to burden the Court with a repetition of them; instead, we respectfully refer the Court to General Motors' brief in *Wood*.[1]

We will repeat, however, that there is remarkable – maybe unprecedented – unanimity in the courts around the country that airbag claims are preempted by federal law. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Nissan Motor Corp. v. Superior Court*, ___ Cal. App. 3d ___, 261 Cal. Rptr. 80 (Ct. App. 1989); *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988), *appeal dismissed*, 74 N.Y.2d 715, 543 N.Y.S.2d 401 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988); *Pokorny v. Ford Motor Co.*, 714 F.

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[1] With this brief General Motors also has served petitioner's counsel with a copy of General Motors' Brief in Opposition to Petition for Certiorari in the *Wood* case ("*Wood* Opposition").

Supp. 739 (E.D. Pa. 1989) (on appeal to Third Circuit); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Heftel v. General Motors Corp.*, 1988 Westlaw 19615 (D.D.C. Feb. 23, 1988); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. Dec. 27, 1988); *Howard v. American Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 11,955 (S.D. Tex. July 6, 1988); *Bass v. General Motors Corp.*, 1987 Westlaw 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 Westlaw 18670-71 (D. Ariz. 1986).[2] Those cases are plainly right, under settled principles laid down by this Court. *See Wood* Opposition, pp. 11-15.

The petition should be denied.

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[2] In addition to the published decisions, dozens of unpublished decisions hold airbag claims preempted. *See, e.g., Hunt v. Ford Motor Co., Inc.*, No. 88-AR-1756 (N.D. Ala. March 30, 1989); *Falk v. Chrysler Corp.*, No. R-87-1057 (D. Md. Feb. 24, 1989); *Rodriguez v. General Motors Corp.*, No. CV88 3361 SWV (GX) (C.D. Cal. Oct. 4, 1988); *Ritt v. General Motors Corp.*, No. 86 C 1737 (N.D. Ill. Jan. 20, 1988); *Distler v. General Motors Corp.*, Civ. No. 4-86-821 (D. Minn. Sept. 8, 1987); *Donnelly v. General Motors Corp.*, No. 86-576-JU (D. Or. Aug. 3, 1987); *Dever v.*

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REASONS FOR DENYING THE WRIT

Petitioner offers no reason to grant review here. She says the Tenth Circuit violated the separation of powers,

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Langthorp, No. 85-53451 (Tex. Dist. Ct. Aug. 24, 1989); *Seemann v. General Motors Corp.*, No. 86-6145 (CL) "AI" (Fla. Cir. Ct. Aug. 31, 1989); *Kane v. Mitsubishi Motor Sales of America Inc.*, No. 9649/88 (N.Y. Sup. Ct. June 19, 1989); *Schwartz v. Volvo*, North Am. Corp., No. CV86-7701 (Ala. Cir. Ct. Mar. 10, 1988), *aff'd on other grounds*, ___ So. 2d ___, No. 87-1272 (Ala. 1989); *Matthews v. Chrysler Motor Corp.*, No. 87-P-675 (Ohio Ct. C.P. Jan. 9, 1989); *Gingold v. Audi-NSU-Auto Union AG*, No. 6155 (Pa. Ct. C.P. May 12, 1988); *Groves v. Chrysler*, No. 84-7-302 (Or. Cir. Ct. March 15, 1988); *Little v. Chrysler*, No. 84-11-103 (Or. Cir. Ct. March 15, 1988); *Sutton v. Allenberg*, No. 6551 (Idaho Dist. Ct. Feb. 25, 1988); *Noone v. General Motors Corp.*, No. 85-68704 (Tex. Dist. Ct. Jan. 24, 1989); *McRoberts v. Ryals*, No. 86-1630-[illegible] (Tex. Dist. Ct. Oct. 13, 1988); *Garman v. Mazda Motor Corp.*, No. 85-13839-F (Tex. Dist. Ct. April 6, 1988); *Davis v. Whitworth*, No. 86-125-199 (Tex. Dist. Ct. July 19, 1988); *Perkins v. General Motors Corp.*, No. EAC 57623 (Cal. Super. Ct. Oct. 19, 1988); *Smith v. Towns*, No. 88CV-02-1011 (Ohio Ct. C.P. Oct. 24, 1988); *Hill v. Oakland County Road Comm'n*, No. 88-344327 NP (Mich. Cir. Ct. Nov. 9, 1988); *Seymour v. General Motors Corp.*, C.A. No. 86-2815 (R.I. Super. Ct. Sept. 26, 1988); *Mazey v. General Motors Corp.*, No. A 243811 (Nev. Dist. Ct. Dec. 6, 1988); *Mackey v. American Honda Motor Co.*, No. 83CV-08-4508 (Ohio Ct. C.P. Dec. 29, 1986); *Parker v. Evans*, No. OCV 36391 (Cal. Super. Ct. June 10, 1988); *McLaughlin v. General Motors Corp.*, No. LK-27-2 (Va. Cir. Ct. May 16, 1988); *Martinez v. Ford Motor Co.*, No. 87-893CW (Fla. Cir. Ct. Aug. 15, 1988); *Aronowitz v. General Motors Corp.*, Index No. 23118/84 (N.Y. Sup. Ct. Mar. 18, 1988); *Wolfe v. General Motors Corp.*, No. CV8720704 (Ohio Ct. C.P. Mar. 6, 1988); *Pederson v. Ford Motor Co.*, No. 3AN-85-15565 (Alaska Super. Ct. Sept. 24, 1987); *Ross v. Ford*

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but it did not. She says the decision threatens the vitality of *Erie*,[3] but it does not. She says the case will "thwart the evolving common-law of product liability" (Pet., p. 9), but it will not. She says that the courts are split on the airbag preemption issue, but they are not. Indeed, half the arguments petitioner makes are made for the first time in this Court, and none is sound.

The Tenth Circuit held airbag claims impliedly preempted (App., p. A5), following "the general principles" and "implied preemption rule" of the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). (App., p. A6) We respond to petitioner's arguments, to the extent they differ from those in the *Wood* petition.

A. The Argument That The Supreme Court Has Never Found Implied Preemption Where An Act Has A Savings Clause.

Petitioner declares that she "has been unable to find one case decided by this Court where preemption was found in the face of language as clearly and explicitly reflecting Congress' intent on preserving common law

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Motor Co., No. CV119361 (Ohio Ct. C.P. May 5, 1987); *Puzio v. General Motors Corp.*, No. L-07-2325-85 (N.J. Super. Ct. March 27, 1987); *Soboscienski v. Ford Motor Co.*, No. 2NO-85-246 (Alaska Super. Ct. Oct. 28, 1986); *Phillips v. Namie*, No. 85-33951-CA-07 (Fla. Cir. Ct. Sept. 22, 1986).

[3] *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938).

claims as that of § 1397(c) of the Safety Act."[4] (Pet., p. 7) If so, that is because petitioner has not looked, for it is settled law that a general savings clause like this one will not save common-law claims that conflict with federal law. *See, e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (Act provided "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law . . . "; existing but conflicting common law remedy held preempted; general savings clause cannot "in reason be construed" in a way "inconsistent with the provisions of the act. . . . [An] act cannot be held to destroy itself"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496, 494 (1987) (Act provided "nothing in this section shall restrict any right which any person . . . may have under . . . common law"; Senate Report stated "compliance with . . . Act . . . would not be a defense to a common law action for . . . damages"; common law claims subjecting water discharger to "a variety of common law rules" along waterways would undermine Congress' purpose to achieve "clear and identifiable" discharge standards; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *see also Taylor*, 875 F.2d at 827-28 n.20; *Wood*, 865 F.2d at 415; *Wickstrom*, 416 N.W.2d at 840.

Indeed, in *Abilene* and *Ouellette*, the statute at issue did not even have a preemption clause; here, the Act itself preempts a "State" from "enforcing" "any safety standard applicable to the same aspect of performance or item of equipment" not "identical" to an on-point federal standard. 15 U.S.C. § 1392(d). Petitioner ignores § 1392(d).

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[4] The statute's full name is the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*

B. The Argument That The Court Violated The Separation Of Powers.

Petitioner says that the Tenth Circuit "ignores the separation of powers" and "shifts the focus of inquiry under preemption analysis from what Congress intended to the court's own perception of proper policy." (Pet., pp. 7-8) This is the first we have heard about separation of powers in this case,[5] and it is nonsense. The Tenth Circuit adopted *Wood*, and *Wood* began its analysis of the issue by holding "[p]reemption is a matter of Congressional intent." *Wood*, 865 F.2d at 401. It went on to scrutinize Congress' purposes, as expressed in § 1397(c) and § 1392(d) (which petitioner ignores), and in the legislative history (which petitioner also ignores). 865 F.2d at 403-07. It concluded that "Congress's purposes . . . plainly imply a preemptive intent" here. 865 F.2d at 402.

C. The Argument That The Tenth Circuit's Decision Will "Send Us Back To Pre-Erie Days."

Petitioner says the decision below will "thwart the evolving common law of product liability" (Pet., p. 9), and send us "back to pre-*Erie* days." (Pet., p. 14) We agree that the common law is "a prized part of our Anglo-American legal heritage," but with all due respect to Pollock and Plucknett and Pound (Pet., p. 11), this case

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[5] This Court ordinarily will not exercise its jurisdiction to review issues not raised below. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Heckler v. Campbell*, 461 U.S. 458, 469 n.12 (1983); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

has nothing whatever to do with the development of the common-law or *Erie*. Nobody said that federal substantive law governed petitioner's airbag claim on the merits; indeed, the district court held that petitioner's airbag claim was governed by New Mexico law on the merits, and that it "does not state a cause of action under New Mexico law" even if not preempted. (App., p. A9) Moreover, *Wood* made clear that federal preemption is "entirely different" from whether compliance with federal standards is a defense on the merits – a state law question. 865 F.2d at 417. Until now, no one even imagined that anyone thought this was an *Erie* case. It isn't.

Petitioner's claim that the holding in this case will have "great potential impact" on "many other areas in which Congress has enacted minimum design standards" (Pet., p. 11) is also fantasy. The implied preemption holding in *Wood*, adopted here, turns on Congress' intent as expressed in the language and history of the Safety Act, and is by its terms "narrow." 865 F.2d at 417. Even in that narrow arena, a "direct conflict between a common law design standard and a Safety Act performance standard" is "a rare event indeed." 865 F.2d at 402 n.9, 416-17.[6]

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[6] Plaintiff charges General Motors with a "coordinated campaign" to raise the preemption argument and defeat the common law. (Pet., pp. 3, 8, 16) General Motors has simply raised the defense when plaintiffs have filed these cases. In fact, it is petitioner's *amici* (Pet., p. 5) who have mounted a "coordinated campaign" to use the common law to bypass Congress' regulatory plan, and reopen in the courts the mandatory airbag issue the Department of Transportation resolved in adopting a rule allowing either seat belts or airbags. *See, e.g.*,

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Indeed, this case belies petitioner's claim that the Tenth Circuit's decision will "thwart" product liability law and leave injured people "without any remedies whatsoever." (Pet., p. 9) Petitioner had no airbag claim under state law, but she had a state-law remedy – a claim that the seat belts in the car were defective. She tried that claim to a jury, and lost. Now she has appealed to the Tenth Circuit, asking it to reverse that common-law jury verdict. That appeal is pending; it will, of course, be decided, under *Erie*, under state law.

D. The Argument That There Is No Preemption "Even Where A Federal Judge Determines That The State Policy Is In Conflict With The Federal Policy."

Petitioner next announces that there cannot be preemption "even where a federal judge" determines "that the state policy is in conflict with the federal policy" (Pet., p. 10), in particular "in those areas that have been traditionally reserved to state supervision." (Pet., p. 13)

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Teret & Downey, *Air Bag Litigation*, 18 Trial (July 1982) at 93. As explained in the article entitled *The Air Bag Goes To Court*, N.Y. Times, Oct. 29, 1984, § D at 1, col. 4:

> [A] small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the airbag question out of the regulatory agencies and into the courts. . . . "We are trying to use economic pressure to force them to offer airbags," said Joan Claybrook, . . . one of the leading forces behind the campaign [and a founder of Trial Lawyers for Public Justice].

But a state law that conflicts with federal policy "is preempted by direct operation of the supremacy clause," *Brown v. Hotel & Restaurant Employees and Bartenders International Union*, 468 U.S. 491, 501 (1984), regardless of the importance to the state of its own law.

> The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.

Free v. Bland, 369 U.S. 663, 666 (1962). *Accord Felder v. Casey*, ___ U.S. ___, 108 S. Ct. 2302, 2306 (1988) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield"); *see also Taylor*, 875 F.2d at 826; *Wood* Opposition at 25 n.19.[7] That is what federal supremacy means.

E. The Argument That "The Courts Have Substantially Divided In Result."

Finally, petitioner argues that "the issue has been raised in more than twenty cases and the courts have substantially divided in result." (Pet., p. 16) Petitioner appears not to have updated her survey since 1987. In fact, there now have been over fifty cases, and there is

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[7] Petitioner says the court of appeals "wholly ignores" the presumption against preemption (Pet., p. 15), but that is wrong. The court of appeals followed *Wood*, and *Wood* declined to find express preemption by § 1392(d) because it found no "specific intent in section 1392(d) expressly to preempt an action of the present type." 865 F.2d at 407. That is exactly what the presumption against preemption instructs courts to do.

virtual unanimity that airbag claims are preempted. *See* pp. 2-3 & n.2, above. Of the reported cases alone, petitioner omits all the state appellate cases – *Nissan Motor Corp. v. Superior Court, Gardner,* and *Wickstrom* – and the recent federal district court cases – *Pokorny, Surles, Kelly, Kolbeck, Heftel, Hunter,* and *Howard. See* pp. 2-3, above.

Petitioner cites eleven "cases." (Pet., p. 16-17) All but two[8] are unpublished summary orders, and all issued before any appellate case was decided. Several have since been reversed, overruled, or superseded by appellate decisions or federal opinions in the jurisdiction. *See Seemann v. General Motors Corp.*, No. 86-6145 (CL) "AI" (Fla. Cir. Ct. August 31, 1989) (granting motion for reconsideration, vacating earlier decision, and granting summary judgment against passive restraint claim); *Honda Motor Co. v. Kimbrel,* 189 Ga. App. 414, 376 S.E.2d 379 (Ct. App. 1988) (reversing trial court denial of summary judgment on state-law duty grounds, and citing *Cox,* above, on preemption issue; petitioner mistakenly identifies this as Texas case); *Burge v. Blight,* No. 41-74-75 (Cal. Super. Ct. June 30, 1987) (superseded by *Nissan Motor Corp. v. Superior Court,* above); *Lynch v. Mims,* No. GCG 85-0019 (Fla. Cir. Ct. Aug. 20, 1985) (decided before *Seemann* and *Martinez,* n.2, above, and Eleventh Circuit decision in *Taylor*); *Steenbergen v. Ford Motor Co.*, No. 85-15718-C (Tex. Dist. Ct. June 30, 1986) (decided before Texas federal district court decisions in *Bass* and *Surles,* and state court decisions in *Noone, McRoberts, Garman* and *Dallas,*

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[8] *Murphy v. Nissan Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987), is on analysis a reclining seat, not passive restraint, case. *Garrett v. Ford Motor Co.*, 684 F. Supp. 407 (D. Md. 1987), is a rear seat belt, not passive restraint, case.

n.2, above); *Munson v. Pearcy*, No. B-840,570 (Tex. Dist. Ct. May 15, 1986) (same); *Picadio v. General Motors Corp.*, No. GD 85-14613 (Pa. Ct. C.P. Dec. 28, 1987) (decided before Pennsylvania federal court decisions in *Kolbeck* and *Pokorny*, and state court decision in *Gingold*, n.2, above).

There is virtual unanimity here.

F. Even If There Were Some Issue To Review, This Is Not The Appropriate Case To Review.

Even if there were an issue to review, this would not be an appropriate case in which to grant certiorari. First, the district court held that even if petitioner's claim were not preempted, it would state no claim under New Mexico (the applicable state) law. (App., p. A9) The Tenth Circuit did not reach that issue, for it did not have to. (App., p. A5 n.4) However, the Tenth Circuit would have given great deference to the New Mexico district judge's view of local law. *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986); *Wells Fargo Business Credit v. American Bank of Commerce*, 780 F.2d 871, 874 (10th Cir. 1985).[9] There is no reason to grant review here, where even if the preemption ruling were reversed, the airbag claim does not state a claim as a matter of state law anyway.

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[9] The district court's ruling also accords with holdings in other jurisdictions, applying the law of other states, that airbag claims are not cognizable. *See, e.g., Schwartz v. Volvo N. Am. Corp.*, ___ So. 2d ___, No. 87-1272 (Ala. 1989); *Honda Motor Co. v. Kimbrel*, 189 Ga. App. 414, 376 S.E.2d 379 (Ct. App. 1988); *Kern v. General Motors Corp.*, 724 P.2d 1365 (Colo. App. 1986); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987);

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Second, petitioner has an appeal pending from the defense verdict on her defective belt claim. *See* p. 9, above. If the Tenth Circuit were to reverse, and petitioner to prevail on remand, any decision on the preemption issue by this Court would be moot. The Court should not grant review where its decision may be mooted by proceedings below.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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September 18, 1989

(Continued from previous page)

Thomas v. Subaru of Am., Inc., 655 F. Supp. 22 (E.D. Tenn. 1985), *aff'd per curiam*, 815 F.2d 80 (6th Cir. 1987); *Higgs v. General Motors Corp.*, 655 F. Supp. 22 (E.D. Tenn. 1985); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. Dec. 27, 1988).

RULE 28.1 LIST OF PARTIES

APPENDIX A

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly owned except the following:

Aero Vironment Inc. (USA)

Alambrados Automotrices, S.A. de C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Applied Intelligence Systems, Inc. (USA)

Aralmex, S.A. de C.V. (Mexico)

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Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Avis, Inc. (U.S.A.)

Bujias Mexicanas, S.A. de C.V. (Mexico)

Cableados de Juarez, S.A. de C.V. (Mexico)

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Calsonic Harrison Co., Ltd. (Japan)

Comau Productivity Systems, Inc. (USA)

Compagnie de Faisceaux Tunisian International S.A. (Tunisia)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Delfa, C.A. (Venezuela)

Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)

Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)

Convesco Vehicles Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)

Delmex de Juarez, S.A. de C.V. (Mexico)

Delredo, S.A. de C.V. (Mexico)

Detroit Deere Corporation (USA)

Detroit Diesel Corporation (USA)

DHB – Componentes Automotivos S.A. (Brazil)

DHMS Industries, Ltd. (Korea)

Diffracto Limited (Canada)

DR DE CHIHUAHUA, S.A. de C.V. (Mexico)

Ensamble de Cables Y Componentes, S.A. de C.V. (Mexico)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)

General Motors do Brasil, Ltda. (Brazil)

General Motors de Colombia S.A. (Colombia)

General Motors del Ecuador S.A. (Ecuador)

General Motors de Mexico, S.A. de C.V. (Mexico)

General Motors Egypt, S.A.E. (Egypt)

General Motors Espana, S.A. (Spain)

General Motors (Europe) AG (Switzerland)

General Motors France (France)

General Motors Hellas, A.B.E.E. (Greece)

General Motors Iran Limited (Iran)

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General Motors de Portugal, Limitada (Portugal)

Genie Mecanique Zairose, S.A.R.L. (Zaire)

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GMFanuc Robotics Corporation (USA)

Hua Tung Automotive Corporation (Rep. of China)

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Ilmor Engineering, Ltd. (England)

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Industrija Delova Automobila, Kikinda (Yugoslavia)

INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Packard Electric Ireland Limited (Ireland)

Promotora de Partes Electronics Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)

Rimir, S.A. de C.V. (Mexico)

Rio Bravo Electricos, S.A. de C.V. (Mexico)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Shinsung Packard Company, Ltd. (Korea)

Sistemas Electricos y Commutadores, S.A. de C.V. (Mexico)

Sung San Company, Ltd. (Korea)

Suzuki Motor Co., Ltd. (Japan)

Tactical Truck Corporation (USA)

Teknowledge, Inc. (USA)

TEREX Equipment Limited (Scotland)

Vauxhall Motors Limited (England)

Vestiduras Fronterizas, S.A. de C.V. (Mexico)

View Engineering (USA)

Volvo GM Heavy Truck Corporation (USA)

Supreme Court, U.S.
FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

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OCTOBER TERM, 1989

PAULINE W. KITTS, as Personal Representative of the Estate of Willard F. Kitts, Deceased,
Petitioner,

vs.

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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF KITTS' PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1989

PAULINE W. KITTS, as Personal Representative of the Estate of Willard F. Kitts, Deceased,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF KITTS' PETITION FOR WRIT OF CERTIORARI

This matter is before the Court on a Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Pauline Kitts August 17th, 1989. As described by Petitioner, see Petition at 5 n. 3, the issues presented in Kitts' Petition are substantially identical to the issues in *Patricia M. Wood, et al. v. General Motors Corporation*, No. 89-46. On October 2, 1989 this Court invited the Solicitor General to file a brief in the *Wood* case, expressing the views of the United States. A copy of the Clerk's letter articulating this Court's Order is attached as Exhibit A.

Petitioner submits that the Solicitor General should also be invited to file a brief in the *Kitts* case. A review

of both *Kitts* and *Wood* would permit the Solicitor General and this Court to have before them a broader range of regulatory action regarding passive restraint systems in automobiles and therefore a more complete factual basis for evaluating the impact of the lower courts' holdings preempting state common law remedies.

DATED October 11, 1989.

Respectfully submitted,

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EXHIBIT A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 2, 1989

Mr. Arthur H. Bryant
1625 Massachusetts Ave., N.W.
Suite 100
Washington, DC 20036

Re: Patricia M. Wood, et al.,
v. General Motors Corporation
No. 89-46

Dear Mr. Bryant:

The Court today entered the following order in the above entitled case:

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
Joseph F. Spaniol, Jr., Clerk